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No. ..-....

IN THE

Supreme Court of the United States

October Term, 1984

HENNING REIMER,

Appellant,

vs.

THE STATE OF CALIFORNIA,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT.

JURISDICTIONAL STATEMENT.

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Question Presented.

Probable cause or at least a reasonable suspicion under 19 U.S.C. § 482 is required by customs officials to search a person or his personal belongings at an international border or its functional equivalent.

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No. ..-....

IN THE

Supreme Court of the United States

October Term, 1984

HENNING REIMER,

Appellant,

vs.

THE STATE OF CALIFORNIA,

Appellee.

JURISDICTIONAL STATEMENT.

Henning Reimer, the Appellant, appeals from the judgment of the Court of Appeal of the State of California, Second Appellant District dated September 28, 1983 holding that the trial court erred in granting the Appellant's motion to suppress evidence and further ruling that "it is settled that reasonable grounds to search a person or inspect his personal effects at an international port of entry is established solely by reason of entry into the United States from a foreign country."

Opinion.

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division 1 which was "not to be published" appears in the appendix hereto as Appendix "A".

Jurisdiction.

The judgment of the Court of Appeal of the State of California, Second Appellate District was entered on September 28, 1983 reversing the Superior Court for the County of Los Angeles which had suppressed evidence and dismissed the case against Appellant on the basis that said search and seizure were illegal.

Thereafter, the Supreme Court of the State of California on November 28, 1983 denied a hearing in the instant case. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(1).

Constitutional Provisions and Rules.

Fourth Amendment, United States Constitution:

> "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *."

19 U.S.C. § 482:

> "Any of the officers or persons authorized to board or search and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law * * *."

Raising the Federal Question.

From the inception of this case, Appellant has raised the application of the Fourth Amendment of the United States Constitution to Appellant's case and/or the application of 19 U.S.C. § 482 requiring at the very minimum, a "reasonable suspicion to suspect".

These constitutional issues were first raised in the Municipal Court of the Los Angeles Judicial District, County

of Los Angeles on March 16, 1982. Thereafter, the constitutional question was again raised in the Superior Court for the County of Los Angeles resulting in the suppression of all evidence against Appellant and the dismissal of criminal charges against Appellant on October 1, 1982. Appellant continued to raise the constitutional challenges and/or the applicability of 19 U.S.C. § 482 in the Court of Appeal, Second Appellate District which reversed the Los Angeles Superior Court on September 28, 1983 and thereafter in the Supreme Court of the State of California which court refused to grant Appellant a hearing on November 28, 1983.

Statement of the Case.

On December 31, 1981 at approximately 8:30 a.m. Appellant, Henning Reimer and Robert Carlton Enright came through customs at the U.S. Customs Office, Los Angeles International Airport, on flight number 832 from Lima, Peru on Varig Airlines.

There was nothing suspicious about either man; they did not act nervous nor give any reason to believe that they were doing anything illegal.

In the primary inspection line, their hand carried baggage was checked with negative results.

Because a computer check on the TECS machine [which is a United States Treasury Computer], showed both men's names on the computer, they were separated from the other 50 or 60 passengers in primary and sent to a secondary inspection station approximately 100 yards away, out a door and down some stairs.

An "M" was marked at the top of their declarations meaning that there was information in the TECS on these particular persons.

At secondary, the two men's bags were further searched and in a photo album found in Appellant's bag, was a white

powdery substance inside the front and back covers which tested positive for cocaine.

Of the approximately 6 people referred from primary to secondary on the date in question, only Appellant and Enright came to secondary because of something that was on the computer.

The office of the District Attorney for the County of Los Angeles, State of California refused to reveal the source of the TECS computer information and the Judge of the Superior Court for the County of Los Angeles suppressed the evidence and dismissed the case against Appellant and Enright. The motion to suppress the evidence was granted because the computer information was insufficient to warrant the search of the luggage. It was stipulated that there was no search warrant obtained for the search.

The Question Is Substantial.

The right of customs officers to search a person and his belongings for contraband at an international border or its functional equivalent without probable cause or at the very least a "reasonable suspicion to suspect" has never been treated before by this court other than in dicta.

Carroll v. United States, 276 U.S. 132 (1924).

This high court in *United States v. Ramsey*, 431 U.S. 606 (1977) upheld 19 U.S.C. § 482 and implementing postal regulations authorizing customs officials to inspect incoming international mail when they have a "reasonable cause to suspect" that the mail contains illegally imported merchandise.

It is urged that *Ramsey*, supports Appellant's position that 19 U.S.C. § 482 also applies with equal force in this case.

In the case at hand there are two federal statutes which had their origin in 1866. The first statute, 19 U.S.C. § 482 requires officers or persons authorized to board or *search*

and examine vehicles, beasts, *or persons* to have "reasonable cause to suspect there is merchandise imported contrary to law" (Emphasis supplied.)

The second statute, 19 U.S.C. § 1582, allows the Secretary of the Treasury to *prescribe regulations for the search* of *persons* and baggage and authorizes employment of female inspectors for the examination and search of *persons* of their own sex; and all *persons* coming into the United States from foreign countries are liable to detention and search by authorized officers or agents of the government under such regulations. (Emphasis supplied.)

Under 19 U.S.C. § 1582, two regulations were enacted which apply here:

> 19 C.F.R. § 162.6 *Search of persons, baggage and merchandise.*
>
> All *persons*, baggage, and merchandise arriving in the Customs territory of the United States from places outside thereof are liable to inspection and search by a Customs officer. District directors and special agents in charge are authorized to cause inspections, examinations, and search to be made under section 467, Tariff Act of 1930, as amended (19 U.S.C. § 1467), of *persons*, baggage, or merchandise even though such *persons*, baggage, or merchandise were inspected, examined, searched or taken on board the vessel at another part or place in the United States or in the Virgin Islands, if such action is deemed necessary or appropriate.
>
> 19 C.F.R. § 162.7 *Search of vehicles, persons, or beasts.*
>
> A customs officer may stop, search and examine any vehicle, *person*, or beast, or search any trunk or envelope wherever found, in accordance with section 3061 of the Revised Statute (*19 U.S.C. § 482*). (Emphasis supplied.)

It is more interesting to note that Section 162.7 specifically cites *19 U.S.C. 482* which requires "reasonable cause to suspect."

The legislative history of 19 U.S.C. § 482 and 19 U.S.C. § 1582 clearly teaches that these two sections must be read and considered together.

Border searches have long been recognized as an exception to the Fourth Amendment requirement that searches be based on probable cause. *Boyd v. United States*, 116 U.S. 616 (1886). The exception is based on two historical events: the passage of an Act to regulate the Collection of Duties, 1 STAT 29, by the first congress and the proposal of the Fourth Amendment, 1 STAT 97, two months later by the same congress. *United States v. Ramsey*, 431 U.S. 606, (1977). In *Boyd v. United States*, 116 U.S. 616 (1886) the court states the following:

> "The first statute passed by congress to regulate the collection of duties, the act of July 31, 1789, (1 St. 43,) . . . As this act was passed by the same congress which proposed for adoption the original amendments to the constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable' and they are not embraced within the prohibition of the amendment".

The original customs act contained forty sections. Section 23 of this Act provided in pertinent part:

> "(I)t shall be lawful for this collector, or other officer of the customs, after entry made of any goods, wares, or merchandise, on suspicion of fraud, to open and examine, in the presence of two or more reputable merchants, any package or packages thereof . . ."

Section 24 provided in pertinent part:

> "(E)very collector, naval officer and surveyor, or other person specially appointed by either of them for that

purpose, shall have full power and authority to enter any ship or vessel, *in which they shall have reason to suspect* any goods, wares, or merchandise subject to duty shall be concealed; and therein to search for, seize, and secure any such goods, wares or merchandise; and *if they shall have cause to suspect* a concealment thereof, in any particular dwelling-house, store, building, or other place, they or either of them shall, upon application of oath or affirmation to any justice of the peace be entitled to a warrant to enter such house, store, or other place (in the day time only) and thereto search for such goods, and if any shall be found to seize and secure same for trial . . ." 1 STAT 29, 43. (Emphasis supplied.)

The Act was amended the following year by the second session of the same congress, Act of August 4, 1790, chap. 35, sec. 73, 1 STAT 145 in response to an address to congress by then Secretary of the Treasury, Alexander Hamilton. See, "Operations of the Act Laying Duties on Imports", *State Papers*, Finance, Vol. I, 45-51, April 22, 1790.

The Act was amended by the Fifth Congress, 1 STAT 627, Ch. 22, statute III, March 2, 1799. The language of the original act was retained as reflected in sections 67 and 68 of the Act.

In 1866, the Act was substantially amended. It was presented as Senate Bill 222, An Act to Prevent Smuggling. The bill was prepared at the Treasury Department. New provisions were added.

> "These new provisions apply chiefly to the northern, northeastern, and northwestern frontiers, and are suggested by the relations which have sprung up in a few years past between the British Provinces on this continent and that region of our country." Colloquy of

Mr. MORRILL, Cong. Globe, 39th Cong. 1st Sess., 2563, 1866.

Section 2 of the Act to Prevent Smuggling read in pertinent part:

> ". . . (I)t shall be lawful for any officer of the customs . . . to go on board any vessel . . . and to inspect, search, and examine the same and any person, trunk, or envelope *on board* . . . and if it shall appear that any breach or violation of the laws of the United States has been committed . . . such vessel, or goods *on board* . . . is or are liable to forfeiture . . ." 14 STAT 178. (Emphasis supplied.)

It was moved by Mr. HUMPHREY to amend section 2 to insert the words "when he or they shall suspect". Cong. Globe, *supra*, 3420. That motion was defeated. *Section 2 pertained only to vessels* and to goods, merchandise, and wares on board.

Section 3 of the Act provided in pertinent part:

> "That any of the officers or persons authorized by the second section of this act to board or search vessels may stop, search, and examine, any vehicle, beast, or person *on which or on whom he or they shall suspect* there are goods, wares, or merchandise which are subject to duty or shall have been introduced into the United States in any manner contrary to law, . . . and to search any trunk or envelope, wherever found, in which he may have a *reasonable cause to suspect* there are goods which were imported contrary to law; . . . and the Secretary of the Treasury may from time to time prescribe regulations for the search of persons and baggage, and for the employment of female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the government, under such regulations as the Secretary of the Treasury

shall from time to time prescribe . . .'' 14 STAT 178.

Section 3 was discussed in debate on the floor of the senate.

Mr. HUMPHREY:

> ''. . . under the third section these men are authorized to arrest any person and examine his trunks and vehicle for the purpose of seeing whether there is any property which has been smuggled. But the officer can do this only where he has reason to believe the person or carriage has goods liable to duty. *I think that is at least an amount of caution which ought to be placed in this bill* when we are to put such immense powers into the hands of such men as will doubtlessly have the privilege of exercising them.'' Cong. Globe, 39th Cong., 1st Sess., 2563 (1886).

Section 3 of the act retained the ''reason to suspect'' language. This section was in response to persons entering the country on foot, horseback, or carriage who may have concealed contraband on themselves or on their horse or in a vehicle.

It was clearly the intent of the 39th Congress not to grant unlimited authority to customs officers. The ''reasonable suspicion'' language which originated in 1789 remained even though smuggling had become a serious problem. Cong. Globe 39th Cong., 1st Sess. 2564-71 (1886).

It is obvious from a careful reading of section 3 that both 19 U.S.C. 482 and 19 U.S.C. 1582 originated from this section. Section 3 was divided into subsections in 1871 by a commission appointed to revise the statutes of the United States. See Report of the Commission, 42nd Congress, 2nd Sess., Misc., Doc. no. 3, Vol. 1, December 4, 1871. The revised and renumbered statutes were adopted by the 43rd Congress in 1873. 18 STAT, Part, 588.

Both 19 U.S.C. 482 and 19 U.S.C. 1582 originated in the same section, (3) of the same act. It is clear that that legislators contemplated that section 3 would be read as a whole.

Both 19 U.S.C. 482 and 19 U.S.C. 1582 apply in the instant case. They are not in conflict. The only instance where congress has expressly extended authority of customs officers without reasonable suspicion is when boarding ships on the open sea. *United States v. Villamonte-Marquez*, ___ U.S. ___ (1983). Authority to search persons crossing United States borders has always been based on reasonable suspicion.

The Act of 1789 expressly provides searches to be conducted under circumstances "*in which they shall have reason to suspect.*" First Congress, Sess. 1, Chap. 5, section 23, 1789, 1 STAT 29, 43. Nowhere else in the 1789 act is there mention of a search except (1), packages could be opened in the presence of two reputable merchants, 1 STAT 29, 43 § 23 and (2), a customs officer could obtain a warrant to search a house. 1 STAT 29, 43 § 24. Suspicion was required in both of these latter situations.

It is significant that in almost two hundred years since the Act to Regulate the Collection of Duties, 1 STAT 29, was deemed to create the border search exception to the Fourth Amendment, the express language requiring a reasonable cause to suspect has been retained.

The Trial Court in this case applied the provisions of 19 U.S.C. § 482 to the facts and suppressed the evidence finding that there was no "reasonable cause to suspect".

The Court of Appeal for the Second Appellate District in reversing the Trial Court surprisingly relied on *United States v. Ramsey*, 431 U.S. 606 (1977). (See Appendix "A".)

Ramsey held that a search of the incoming international mail under 19 U.S.C. § 482 required a "reasonable cause to suspect".

The California Court of Appeal in its decision completely ignored the clear provisions and expressed wording of the statute and ignored its validity. 28 U.S.C. § 1257(1).

The following United States Supreme Court cases hold with respect to border searches that any stop or search requires probable cause, reasonable suspicion, or other discretion-limiting features.

Almeida-Sanchez v. United States, 413 U.S. 266 (1973);

United States v. Brignoni-Ponce, 422 U.S. 873 (1975);

United States v. Ortiz, 422 U.S. 891 (1975);

United States v. Martinez-Fuerte, 428 U.S. 543 (1976);

Delaware v. Prouse, 440 U.S. 648 (1979).

The most recent United States Supreme Court case, *United States v. Villamonte-Marquez*, ___ U.S. ___ (1983), upheld 19 U.S.C. § 1581(a) which allowed customs officials, without any suspicions of wrongdoing, to "board for inspection of documents" a vessel that is located in waters providing ready access to the open sea. (Emphasis supplied.)

The Court's emphasis in *Villamonte*, was on factual differences between vessels located in waters offering ready access to the open sea and automobiles on principal thoroughfares in the border area. The Court also considered the historical origin of Section 1581(a).

Other than *Villamonte*, which deals with a different statute, no case by the United States Supreme Court has ruled that 19 U.S.C. § 482 is not the applicable standard for searching persons and their belongings at the border based

on "reasonable cause to suspect". As a matter of fact, this court in *United States v. Ramsey, supra*, reflects that Title 19 U.S.C. § 482 is "alive and well".

The Circuit Courts of Appeals are in conflict over the application of 19 U.S.C. § 482 and 19 U.S.C. § 1582, as noted by the following representative cases.

United States v. Chavarria (5th Cir. 1974) 493 F.2d 935, 937 applied 19 U.S.C. Section 1582 as stated:

> "The Courts have long recognized the government's right to search and detain travelers at our international boundries on the basis of *reasonable suspicion* . . ." (Citations omitted.)

United States v. Steinkoenig (5th Cir. 1973) 487 F.2d 255 required reasonable suspicion under 19 U.S.C. Section 482 in the nature of an informer's tip and surveillance.

United States v. Diemler (5th Cir. 1974) 498 F.2d 1070, 1072 reversed the district court because the government did not meet its burden and show the existence of "reasonable suspicion" of a customs or immigration violation.

The Fifth Circuit Court of Appeals as seen *supra* requires "reasonable suspicion" under *both* statutes. This interpretation and construction appear to be correct on the basis of the sections' legislative history. See, also, *Stassi v. United States* (5th Cir. 1969) 410 F.2d 946.

In *Alexander v. United States* (9th Cir. 1966) 362 F.2d 379, 382 the Court in considering both statutes stated that "unsupported or mere suspicion alone is sufficient to justify a search for purposes of customs law enforcement." In *Alexander*, the suspicion was from a tip and surveillance.

In *United States v. Diamond* (9th Cir. 1973) 471 F.2d 771, 773 the Court applied 19 U.S.C. § 482 and reviewed the evidence for a "founded suspicion that a violation of the customs law or laws relating to narcotic drugs was occurring."

In *Klein v. United States* (9th Cir. 1973) 472 F.2d 847, 849 the Court stated that a border search of a vehicle was subject to a general test of reasonableness but could be made with or without cause or on unsupported or mere suspicion alone. The court further held that mere entry alone into the United States from a foreign country was sufficient reason for a border search.

Witt v. United States (9th Cir. 1961) 287 F.2d 389, 391, cert. denied 366 U.S. 950, 81 S.Ct. 1904, 6 L.Ed.2d 1242, holds "mere suspicion has been held enough cause for a search at the border". In *Witt* there was a description of the car and information to the border guards as one possibly bearing heroin.

In *United States v. Sheer* (3d Cir. 1979) 600 F.2d 6, 7, the Court applied 19 U.S.C. Section 1582 and only *one* implementing regulation (C.F.R. § 162.6) and held the border search valid "notwithstanding the absence of probable cause or even a quantum of individualized suspicion." 19 U.S.C. 482 was held not to apply.

United States v. Glaziou (2d Cir. 1968) 402 F.2d 8, cert. denied 393 U.S. 1121, 22 L.Ed.2d 126, 89 S.Ct. 999 required "reasonable suspicion" to justify the search. In *Glaziou* there was a *nervousness* and a "bulge around Glaziou's waist."

In summary, some circuits have applied 19 U.S.C. § 1582 while others have applied 19 U.S.C. § 482. Still other circuits have cited to the dicta in *Carroll v. United States*, 276 U.S. 132 (1924) as controlling. The confusion is further magnified by the express holding in *United States v. Ramsey*, 431 U.S. 606 (1977).

It is urged that this Court should make a decision in this area which will once and for all settle the question. The

issue presented by this Appeal appears to be the only border search issue which has not been decided by the United States Supreme Court.

It is also urged that the court consider additionally the fact that in this case the Appellant was removed from the other passengers and taken to a Secondary station approximately 100 yards away, out a door and down some stairs. At the time that Appellant was removed from the other 50 to 60 passengers, there should at that time have been probable cause to conduct any search.

> *United States v. Place*, ___ U.S. ___ (1983); *Florida v. Royer*, ___ U.S. ___ (1983).
>
> ". . . in short, we hold that the detention of Respondent's luggage in this case went beyond the narrow authority possessed by police to detain briefly luggage reasonably suspected to contain narcotics." (See *Place supra*.)

Royer, supra, held that the police had exceeded the limits of an investigative stop where they asked the defendant to accompany them to a small police room and retained his ticket and drivers' license and indicated in no way that he was free to depart.

It is submitted that once there is a separation of the person under investigation from other members of the general public that such a further detention or search must be based upon consent or probable cause. See, *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

Conclusion.

The legislative history confirms the premise that the congress that enacted the Fourth Amendment never intended to allow customs officials freedom to search indiscriminately merely because a border had been crossed. To conclude otherwise is to treat individuals today by a different standard

without the same protections granted by the First Congress. The intent of the legislature is clear from an examination of the history of the two federal statutes in question. To give force to one statute while ignoring the other is to select terms from an act of congress that conveniently justify acts of government officials and to dismiss the expressed protections granted by the same act.

Other than in dicta, the United States Supreme Court decisions have supported the fact that absent a "reason to suspect," a search will not be permitted. The conflict within the Circuit Courts of Appeals and the uneven application of federal law cannot be totally rationalized.

Due to the fact that there is no United States Supreme Court case in point and the further fact that the Circuit Courts of Appeals are divided and also because 19 U.S.C. § 482 has been applied as recently as *Ramsey*, this court should note probable jurisdiction of this Appeal.

DATED: February 10, 1984.

Respectfully submitted,

KIM H. PEARMAN,
A Law Corporation,
Counsel for Appellant,
Henning Reimer.

APPENDIX A.

Opinion.

In the Court of Appeal of the State of California, Second Appellate District, Division One.

The People, Plaintiff and Appellant, v. Robert Carlton Enright and Henning Reimer, Defendants and Respondents. 2 CRIM. NO. 43532. (Super. Ct. No. A-900448).

Filed: September 28, 1983.

APPEALS from an order of the Superior Court of Los Angeles County. Edward A. Hinz, Jr., Judge. Reversed.

Robert H. Philibosian, District Attorney (Los Angeles County), Donald J. Kaplan and George M. Palmer, Deputy District Attorneys, for Plaintiff and Appellant.

John P. Kenosian under appointment by the Court of Appeal, for Defendant and Respondent Robert Carlton Enright.

Kim H. Pearman, for Defendant and Respondent Henning Reimer.

The People appeal the order dismissing an information which charged respondents with the illegal importation of cocaine entered after the court granted respondents' motion to suppress evidence. (Health & Saf. Code, § 11352; Pen. Code, § 1538.5.) Appellant contends: "The trial court erred in suppressing the evidence. Customs officers at an international border (or its functional equivalent) may search a person and the person's effects without any cause whatsoever, solely on the basis that the person is entering the United States from a foreign country. Moreover, the evidence shows there was 'reasonable cause' to search defendants and their personal effects."

The motion to suppress was submitted upon the preliminary examination transcript. The record establishes that on

December 31, 1981, respondents Robert Enright and Henning Reimer arrived at Los Angeles International Airport by means of an international flight from Lima, Peru. As they proceeded through Customs, the Treasury Enforcement Computer System (TECS) revealed that respondents were each suspected to be in possession of cocaine. An inspection of the contents of respondent Reimer's handluggage uncovered 807 grams of cocaine contained within the covers of an "extremely heavy" photograph album that smelled of fresh glue, and 1.34 grams of the substance within Enright's handluggage. The trial court granted the motion to suppress the evidence because the computer information was insufficient to warrant the search of the luggage.

Appellant's contention that the trial court erred in granting the motion to suppress is well taken. It is settled that reasonable grounds to search a person or inspect his personal effects at an international port of entry is established solely by reason of the entry into the United States from a foreign country. (*United States v. Ramsey* (1977) 431 U.S. 606, 616-617; *United States v. Sandler* (5th Cir. 1981) 644 F.2d 1163; *People v. Duncan* (1974) 40 Cal.App.3d 940, 945; see, 19 U.S.C. §§ 482, 1582.)

The justification for inspection of respondents' handluggage was not dependent upon the information obtained by the customs inspectors from the Treasury Enforcement Computer System. (*Cf. United States v. Gallagher* (4th Cir. 1977) 557 F.2d 1041, 1043, cert. den. *Gallagher v. United States* (1977) 434 U.S. 870.) The reasonableness of the inspection of the contents of respondents' handluggage was established solely by the undisputed evidence that respondents had arrived in the United States from a foreign country at an established port of entry, and were subjected to a permissible, reasonable search of the luggage. (*United States v. Sandler, supra*, 644 F.2d at 1165-1168; *cf. People v.*

Leyba (1981) 29 Cal.3d 591, 597.)[1]

The order granting the motion to suppress evidence is reversed.

NOT TO BE PUBLISHED.

HANSON (Thaxton), J.

We concur:

SPENCER, P.J.

LILLIE, J.

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[1]As the content of the computer entry relating to respondents' suspected narcotic activity was extraneous to the justification for a search of respondents' handluggage, the decision in *People v. Ramirez* (Crim. 24489, Sept. 6, 1983) ___ Cal.3d ___, ___ (Slip opn., pp. 19-21) referred to by a respondents' counsel during argument, is not in point.

APPENDIX B.

Notice of Appeal to the Supreme Court of the United States.

In the Court of Appeal of the State of California, Second Appellate District.

Henning Reimer, Appellant v. State of California, Appellee. 2 Crim. No. 43532.

Notice is hereby given that HENNING REIMER, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeal of the State of California, Second Appellate District dated November 23, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1257(1).

[Stamp] KIM H. PEARMAN

KIM H. PEARMAN, Attorney for Appellant

APPENDIX C.

Notice of Appeal to the Supreme Court of the United States.

In the Supreme Court of the State of California.

Henning Reimer, Appellant v. State of California, Appellee. No. 2 Crim #43532.

Notice is hereby given that HENNING REIMER, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of California, denying a hearing in this case on November 23, 1983 and affirming the judgment of conviction entered herein on September 28, 1983 by the Court of Appeal of the State of California, Second Appellate District.

This appeal is taken pursuant to 28 U.S.C. § 1257(1).

[Stamp] KIM H. PEARMAN
KIM H. PEARMAN, Attorney for Appellant

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IN THE SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM 1983
NOS. 83-1356, 83-6156

HENNING REIMER and ROBERT CARLTON ENRIGHT,

Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

Appeal from the Court of Appeal for the State of California, Second Appellate District.

MOTION TO DISMISS APPEAL

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IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM 1983

NOS. 83-1356, 83-6156

HENNING REIMER and ROBERT CARLTON ENRIGHT,

Appellant,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

MOTION TO DISMISS APPEAL

OPINION BELOW

The opinion of the Court of Appeal for the State of California, Second Appellate District, is not reported in a published opinion. However, it is designated as People v. Robert Carlton Enright and Henning Reimer, 2d Crim. No. 43532, and is also reproduced as Appendix A to appellant's briefs on appeal.

JURISDICTION

Appellants claim that jurisdiction is conferred upon this Court to hear this

case based upon 28 U.S.C., section 1251 (1). As we shall show, this claim is without merit.

STATEMENT OF FACTS

The evidence is undisputed. The only witnesses were federal customs officers whose testimony was accepted as truthful by the trial court. Their testimony revealed that defendants, who appeared to be traveling together, arrived at Los Angeles International Airport on an international flight from Lima, Peru. Upon disembarking from the aircraft, they proceeded to the customs area of the airport. Each was carrying hand luggage. At the primary inspection point their passports were checked and their names were entered in the "Treasury Enforcement Computer System" ("TECS") to determine whether there were any outstanding arrest warrants or any

other reason for detaining them. The computer retrieved information indicating that two persons, with names exactly matching those of appellants, together were suspected of possessing cocaine in the past and had possibly been so charged, but that neither had been convicted of such an offense. Other than the computer match, there was nothing suspicious about appellants' behavior or dress. Upon this basis, a search of appellants' hand luggage was conducted which revealed substantial quantities of cocaine in their possession.

The trial court suppressed this evidence upon motion of appellants and dismissed the case. On appeal by the People, the order of suppression was reversed and the Supreme Court of California denied a hearing.

QUESTION PRESENTED

The question presented is whether 28 U.S.C., section 1257(1) confers jurisdiction upon this Court to hear this case and pass upon the merits of the appeal.

ARGUMENT

SINCE THE VALIDITY OF A FEDERAL STATUTE IS NOT DRAWN INTO QUESTION AND THERE HAS BEEN NO DECISION BY A STATE COURT AGAINST THE VALIDITY OF A FEDERAL STATUTE THIS COURT IS WITHOUT JURISDICTION TO HEAR THIS APPEAL.

A.

28 U.S.C., section 1257(1) provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by

the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

* * *

It has long been the rule that mandatory jurisdictional statutes such as 28 U.S.C., section 1257(1), authorizing appeals as of right to the Supreme Court, will be given a narrow construction in the absence of clear Congressional intent to the contrary. (Key v. Doyle (1977) 434 U.S. 59, 65 [54 L.Ed.2d 238, 98 S.Ct. 280], Rehn. den. 434 U.S. 1025 [54 L.Ed.2d 773, 8 S.Ct. 753]; Memphis Nat. Gas Co. v. Beeler (1941) 315 U.S. 649, 651 [86 L.Ed. 1090]; Pilkinton v. Pilkinton (8th Cir. 1968) 389 F.2d 32, 33.)

Accordingly, there being no treaty involved, it is clear from the statute that this Court may review this case only where "is drawn in question the validity of a . . . statute of the United States and the decision is against its validity." (Emphasis added.)[1/]

Moreover, not only must appellants show that a federal statute was necessarily passed upon and found constitutionally invalid by the highest court of the state rendering the decision (Cox v. Texas (1906) 202 U.S. 446 [50 L. Ed. 1099, 1102]; Fashnacht v. Frank (1875) 23 Wall. 416 [23 L.Ed. 81, 82]),

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1. We concur with appellants' contention that this decision by the Court of Appeal is now final within the meaning of 28 U.S.C., section 1257(1), because the California Supreme Court has denied a hearing. (Gospel Army v. Los Angeles (1947) 331 U.S. 543, [91 L.Ed. 1662, 67 S.Ct. 1428].)

but also it must be shown that the federal question presented for review in this Court is substantial. (Street v. New York (1969) 394 U.S. 576, 582 [22 L. Ed.2d 572, 89 S.Ct. 1354].)

B.

Appellants have insisted from the inception of this case that 19 U.S.C., section 482 governed the searches in question and that under its "reasonable cause to suspect" test, the searches were invalid.[2/] The trial court adopted

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2. 19 U.S.C., section 482 provides:

Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever

(Footnote continued on next page.)

this position and found the searches defective. Upon the People's appeal, the Court of Appeal reversed, reasoning as follows:

> The justification for inspection of respondent's handluggage was not dependent upon the information obtained by the customs inspectors from the Treasury Enforcement Computer System.

(Footnote 2 continued from page 6.)

found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial. R.S. § 3061.

(Cf. United States v. Gallagher (4th Cir. 1977) 557 F.2d 1041, 1043, cert. den. Gallagher v. United States (1977) 434 U.S. 870.) The reasonableness of the inspection of the contents of respondents' handluggage was established solely by the undisputed evidence that respondents had arrived in the United States from a foreign country at an established port of entry, and were subjected to a permissible, reasonable search of the luggage. (United States v. Sandler, supra, 644 F.2d at 1165-1168; cf. People v. Leyba (1981) 29 Cal.3d 591, 597.)

At no time has any state court passed upon the question of the validity of any United States statute nor has any court -- particularly the Court of Appeal -- determined that a United States statute is constitutionally or otherwise invalid. Indeed, as appellants' briefs in this Court make clear, the issues presented by this appeal are which of two statutes[3/] govern the

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3. Appellee contended in the California Court of Appeal that 19 U.S.C., section 1582 controls actual or functional border searches, whereas 19 U.S.C., section 482 controls customs searches away from a border but within a customs district. (See United States v. Scheer, (3d Cir. 1979) 600 F.2d 5.) Section 1582 provides:

The Secretary of the Treasury may prescribe regulations for the search of persons and baggage and he is authorized to employ female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations. June 17, 1930, c. 497, Title IV, § 582, 46 Stat. 748.

searches herein and whether some quantum of suspicion is constitutionally mandated before a routine, nonintrusive border search may be undertaken. Neither 19 U.S.C., section 482 nor 19 U.S.C., section 1582 were analyzed to determine their constitutional validity. They are assumed to be constitutionally valid and the Court of Appeal did not treat them otherwise. In fact, it is clear the Court of Appeal did not even consider such an issue.[4]

C.

It is likewise clear that no substantial federal question is involved here. The constitutional validity of a federal statute is not at issue. No state court has even questioned the validity of a federal statute. Implicit

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4. This is understandable since none of the parties presented such issue to the court.

in the decision of the Court of Appeal is the conclusion that the searches in question were valid under both federal statutes, supra.

This conclusion is in accord with the long-standing principle of law that all persons and their personal effects, crossing our international borders[5/] and entering the United States from a foreign country are subject to a routine nonintrusive search. (United States v. Ramsey (1977) 431 U.S. 606, 619 [52 L.2d. 617, 97 S.Ct. 1972]; Almeida-Sanchez v. United States, supra; United

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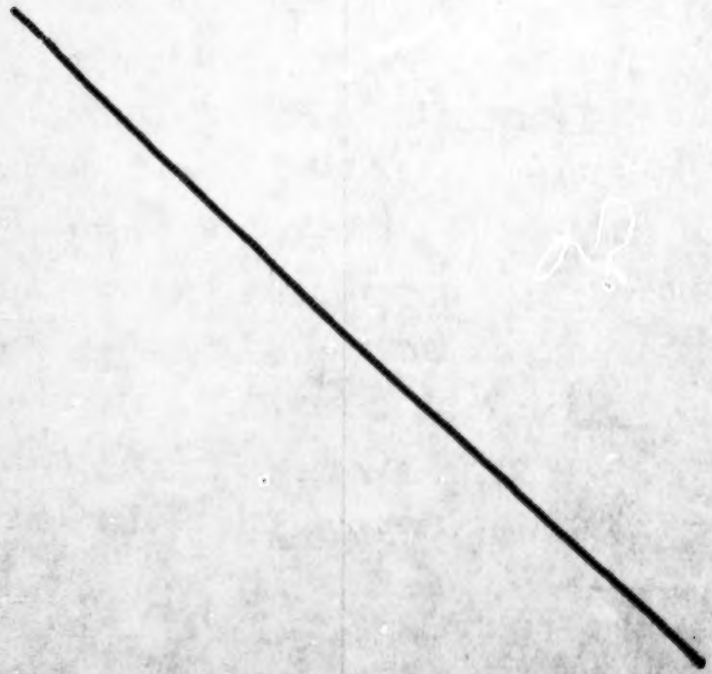
5. The undisputed facts of the instant case demonstrate that Los Angeles International Airport was a functional international border because petitioners Enright and Reimer had just arrived in the United States on an international flight from Peru. (Aleida-Sanchez v. United States (1973) 413 U.S. 266, 272-273, [37 L.Ed.2d 596, 93 S.Ct. 2535] [international airport]; United States v. Scheer (3d Cir. 1979) 600 F.2d 5 [JFK International Airport].)

States v. Thirty-Seven Photographs (1971) 402 U.S. 363, 376 [28 L.Ed.2d 822, 91 S.Ct. 1400]; Carroll v. United States (1925) 267 U.S. 132, 153-154 [69 L.Ed. 543, 45 S.Ct. 280]; Boyd v. United States (1886) 116 U.S. 615, 623 [29 L.Ed. 746, 6 S.Ct. 524].) Thus, a search based on mere subjective suspicion or even on a random basis is lawful. (United States v. Scheer, supra; United States v. Pringle (5th Cir. 1978) 576 Fed.2d 1114, 1117; United States v. Odland (7th Cir. 1974) 502 F.2d 148, 150-151, cert. denied 419 U.S. 1088 [42 L.Ed.2d 680, 95 S.Ct. 679]; Klein v. United States (9th Cir. 1973) 472 F.2d 847, 849; United States v. McDaniel (5th Cir. 1972) 463 F.2d 129, 132; United States v. Stornini (1st Cir. 1971) 443 F.2d 833, 835.)[6/] Indeed,

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6. But, see e.g., United States v. Chavarria (5th Cir. 1974) 493 F.2d 935, 937, for a contrary view.

the mere fact of crossing the border raises "reasonable cause to suspect" such persons may be in possession of contraband or dutiable goods. (United States v. Bilir (4th Cir. 1979) 592 F.2d 735, 741; United States v. Brown (7th Cir. 1974) 499 F.2d 829, 833; United States v. Glaziou (2nd Cir. 1968) 402 F.2d 8, 12.)



Accordingly, it must be concluded that this Court lacks jurisdiction under 28 U.SC., section 1257(1) to pass upon the merits of this appeal.

D.

The foregoing reasoning also leads to the conclusion that this appeal should not be treated as a petition for writ of certiorari. No substantial federal question is presented and, further, the Court of Appeal and the Supreme Court for the State of California have passed upon the merits of appellants' claims and found them wanting. Discretionary review by this Court would not be appropriate in these circumstances.

CONCLUSION

For the foregoing reasons, it must be concluded that this Court lacks jurisdiction to pass upon the merits of

this appeal. Accordingly, the appeal by appellants should be dismissed.

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

The undersigned declares under penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause and employed in the Office of the District Attorney of Los Angeles, California 90014-3296. On the date of execution hereof I served the attached document by depositing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in the County of Los Angeles, California, addressed as follows:

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